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PUBLIC VERSION

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January 12, 2006

ENTERED  
Office of Proceedings

JAN 12 2006

Part of  
Public Record

Vernon A. Williams, Secretary  
Surface Transportation Board  
Case Control Unit, Suite 713  
1925 K Street, N.W.  
Washington, DC 20423-0001

215545  
**Re: STB Docket No. AB-6 (Sub-No. 430X), BNSF Railway Company—  
Abandonment Exemption—in Oklahoma County, OK**

**STB Docket No. AB-1040X, Stillwater Central Railroad, Inc—  
Discontinuance of Service Exemption—in Oklahoma County, OK**

Dear Mr. Williams,

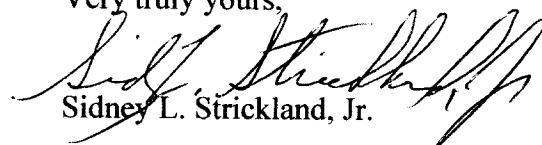
Enclosed for filing please find an original and 10 copies of the Redacted - Public Version and the Highly Confidential - Filed Under Seal Version of the Joint Reply to Petitioners' Statement in Support of Their Petition to Have Applicants' Notice Declared Null and Void. The Highly Confidential - Filed Under Seal Version and the Redacted - Public Version are filed pursuant to the order issued in this proceeding on November 23, 2005.

Additional copies of this letter and of the Joint Replies are enclosed for you to stamp to acknowledge your receipt of them.

Service of this letter and the Joint Replies has been effected by faxing and mailing copies to the Petitioners' counsel.

If you have any questions or concerns, please feel free to contact me.

Very truly yours,

  
Sidney L. Strickland, Jr.

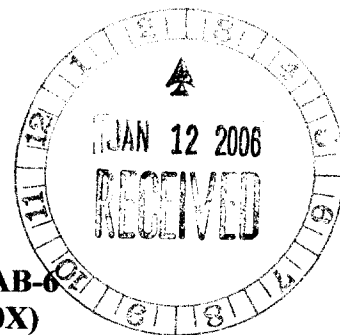
Attorney for BNSF Railway Company

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PUBLIC VERSION

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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**BNSF RAILWAY COMPANY --  
ABANDONMENT EXEMPTION --  
IN OKLAHOMA COUNTY, OK**

**DOCKET NO. AB-6  
(SUB-NO. 430X)**

**STILLWATER CENTRAL RAILROAD,  
INC. – DISCONTINUANCE OF SERVICE  
EXEMPTION – IN OKLAHOMA  
COUNTY, OK**

**DOCKET NO. AB-1040X**

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JOINT REPLY TO PETITIONERS'  
STATEMENT IN SUPPORT OF THEIR  
PETITION TO HAVE APPLICANTS' NOTICE  
DECLARED NULL AND VOID

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Attorney for Stillwater  
Central Railroad, Inc.

DATE FILED: January 12, 2006

AB-6 (Sub-No. 430X)  
AB-1040X

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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BNSF RAILWAY COMPANY --  
ABANDONMENT EXEMPTION --  
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DOCKET NO. AB-6  
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STILLWATER CENTRAL RAILROAD,  
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BNSF RAILWAY COMPANY ("BNSF") and the STILLWATER  
CENTRAL RAILROAD, INC. ("SLWC") ("Applicants") jointly file this Reply to  
Petitioners' Statement in Support of Their Petition to Have Applicants' Notice Declared  
Null and Void ("Statement in Support").

BACKGROUND

On September 23, 2005, Applicants filed a Verified Notice of Exemption under 49  
CFR 1152.50 for BNSF to abandon and SLWC to discontinue service over a rail line that  
extends between Milepost 539.96 and Milepost 542.91 in Oklahoma City, Oklahoma,  
within Oklahoma County, Oklahoma (the "Line"). The Notice was published in the  
Federal Register on October 13, 2005. The Federal Register Notice, among other things,  
stated:

Provided no formal expression of intent to file an offer of financial assistance (OFA) has been received, these exemptions will be effective on November 12, 2005, unless stayed pending reconsideration. Petitions to stay that do not involve environmental issues, formal expressions of intent to file an OFA under 49 CFR 1152.27(c)(2), and trail use/rail banking requests under 49 CFR 1152.29 must be filed by October 24, 2005. Petitions to reopen or requests for public use conditions under 49 CFR 1152.28 must be filed by November 2, 2005, with: Surface Transportation Board, 1925 K Street, N.W., Washington, DC 20423-0001. [Footnotes omitted.]

On November 5, 2005, Michael Richards of Bio-Energy Wellness Center ("Mr. Richards") filed a letter with the Board opposing the abandonment of the Line. In that letter, Mr. Richards contends the Line does not qualify for a two-year out-of-service abandonment because trains run on the Line daily. The only support cited by Mr. Richards is that he has "written documentation from two residents and two businesses **near the tracks, who state that the line is used daily.**" Letter at 1 (emphasis added).

On November 9, 2005, Bio-Energy Wellness Center and North American Transportation Institute ("Petitioners") filed a Petition to Have Notice Declared Null and Void ("Petition"). In the Petition, Petitioners assert that the Notice of Exemption should be declared null and void *ab initio*, because the Line has been used to handle local traffic within the past two years. Petitioners, however, submitted no evidence in support of their allegation. The Board served a decision on November 10, 2005, in this proceeding, that imposed environmental conditions with respect to the abandonment of the Line. The exemptions became effective on November 12, 2005.

On November 21, 2005, Petitioners filed a Motion for a Protective Order, which was granted by the Board on November 23, 2005.

From December 6, 2005, to the present, Petitioners and Applicants have engaged

the discovery process. Applicants have sought from Petitioners the identification of shippers that have moved local traffic between September 24, 2003, and September 23, 2005, on the Line.

On December 23, 2005, Petitioners filed the Statement in Support (a highly confidential version and a redacted version), claiming the Notice contains false and misleading information.

### **REPLY**

As previously noted in our November 9, 2005, Joint Reply to Protests, Mr. Richards and Representative Lindley misconstrued the Notice of Exemption in these Proceedings. The present Petitioners continue to do so as well. The present Petitioners advance five arguments in support of their request to have the Notice declared null and void. As detailed below, Petitioners arguments are specious.

First, Petitioners identify four companies in Oklahoma City that allegedly shipped local traffic on the Line during the time period at issue. Petitioners are incorrect. The companies identified by Petitioners have not engaged in any local traffic movements on the Line during the time period between September 24, 2003, and September 23, 2005.<sup>1</sup>

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<sup>1</sup> Because Petitioners have designated the identity of the companies highly confidential and threatened Applicants' outside attorneys with sanctions, Applicants' outside attorneys requested from BNSF and SLWC records of all shippers located in Oklahoma City. The following information was compiled by outside counsel from those records.

Second, Petitioners contend that the Notice contains false and misleading information because Applicants failed to include within the ambit of "local traffic" ready-mix cement traffic that moved to or from points to the west of Milepost 542.91 (the western end of the Line) and unspecified traffic that moved to or from the rail yard east of Milepost 539.96 (the eastern end of the Line). Since December 29, 2004, SLWC has provided service to certain shippers located at points west of Milepost 542.91, including ready-mix cement plants and has served a few shippers in the North Yard which is located east of Milepost 539.96. Prior to December 29, 2004, BNSF provided similar services. That traffic, however, is not local to the Line and will be unaffected by the proposed abandonment. Consequently, Applicants correctly excluded from local traffic the traffic that Applicants handled to or from the ready-mix cement plants immediately to the west of Milepost 542.91 and to or from the railroad yard immediately to the east of milepost 539.96. Such traffic was and continues to be overhead traffic capable of being re-routed.

Third, Petitioners claim Applicants' Environmental Report misstated the BNSF lease arrangements with SLWC. This is incorrect. The Environmental Report contains all the information required by the STB's regulations as to the Environmental Report.

Fourth, Petitioners assert that Applicants' respective Verifications and Certifications improperly attest that there was no local traffic for at least two years. However, the Certification and Verification signed by Richard A. Batie ("Mr. Batie") and

Arthur E. McKechnie III ("Mr. McKechnie") are accurate. The Board's rules governing out-of-service abandonments require each railroad to certify that "no local traffic has moved over the line for at least 2 years...." 49 C.F.R. 1152.50 (b). As explained below, the Board permits the use of the out-of-service rules for the abandonment of rail lines that have both landlord and tenant carriers. Where, as here, the tenant has not been on the line for the full two-year period, the tenant's certification necessarily pertains only to the time period the tenant was on the line. With respect to the portion of the Line between Mileposts 542.0 and 540.0, BNSF had the exclusive right to handle local traffic on the Line during the entire two-year period. Consequently, its certification pertains to the entire two-year period. With respect to the western segment (between Mileposts 542.91 and 542.0) and the eastern segment (between Mileposts 540.0 and 539.96) of the Line, SLWC gained the right to provide local service on those two segments on December 29, 2004. Consequently, SLWC's certification pertains to the time period after December 29, 2004 and BNSF's certification pertains to the time period from September 24, 2003, to December 29, 2004. Therefore Mr. Batie's and Mr. McKechnie's certifications are accurate and collectively complete for purposes of the Board's rules.

Finally, citing Tulare Valley R. Co. – Aban. – Kings & Tulare Count., CA, 9 I.C.C.2d 1205 (1993) ("Tulare Valley"), Petitioners argue Applicants' inappropriately used the two-year out-of-service class exemption by tacking the experiences of a prior operator of the Line with the present operator of the Line to arrive at the conclusion that the Line has been out of service for two years or longer. Petitioners' reliance on Tulare Valley is misplaced. In that proceeding, the Board's predecessor, the Interstate Commerce Commission ("ICC"), refused to permit the use of the class exemption by a short line to abandon a line it that had recently acquired from a Class 1 railroad. The ICC's concern, however, was not the tacking of the certifications by the new and former owners of the line, which the ICC readily admitted was permissible under a literal reading

of Section 1152.50(b). Rather, the ICC was concerned about the misuse of the class exemption to evade labor protection. The ICC explained that if it permitted the use of the class exemption in such situations a railroad could sell an out-of-service line to a new carrier with no employees who would then turn around and abandon the line without any protective benefits. In this proceeding, both carriers have operating authority over the line, both are before the Board seeking abandonment and discontinuance authority, and the same labor protection will apply to both carriers.

Moreover, the Board and the ICC have consistently permitted the use of the class exemption where the line to be abandoned had both a landlord and tenant carrier. See e.g., Missouri Pac. R. Co. – Aban. – Osage & Morris Count., KS, 9 I.C.C.2d 1228 (1993); Docket No. AB-55 (Sub-No. 478X), CSX Transportation, Inc. – Abandonment Exemption – In Bell County, KY, and Clairborne County, TN and Docket No. AB-290 (Sub-No. 138X), Norfolk Southern Railway Company – Discontinuance of Trackage Rights Exemption – In Bell County, KY, and Clairborne County, TN (not printed), decision served August 5, 1994.

### CONCLUSION

Petitioners have failed to demonstrate the jointly filed Notice of Exemption contained false or misleading information. At best they simply misunderstand the difference between local and overhead movements and that the rerouting of overhead movements is permissible under the Board's rules governing the abandonment of out-of-service rail lines. Consequently, Applicants respectfully urge the Board to deny the Petition.



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Respectfully submitted,

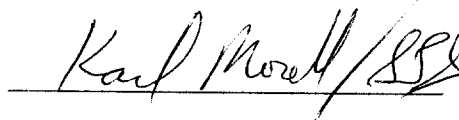
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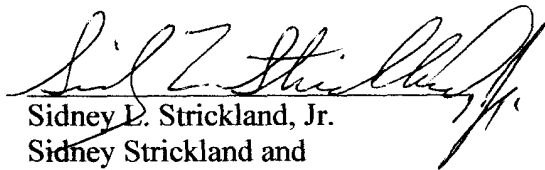
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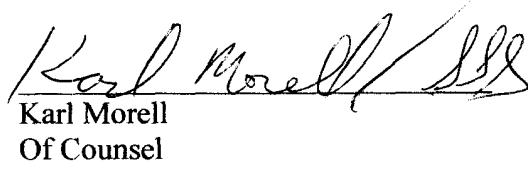
DATE FILED: January 12, 2006

## CERTIFICATE OF SERVICE

BNSF Railway Company and the Stillwater Central Railroad, Inc., ("Applicants")  
by and through their counsel, Sidney L. Strickland, Jr., and Karl Morell, respectively,  
certify that on January 12, 2006, Applicants served a copy of the foregoing Joint Reply to  
Petitioners' Statement in Support of Their Petition to Have Applicants' Notice Declared  
Null and Void by facsimile transmission and by mailing copies thereof by first-class mail  
to Petitioners' counsel, Fritz R. Kahn, Esq.



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